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ESSAY: Virgina is not Safe for "Lovers": The Virginia Supreme Court Rejects *Tarasoff* in *Nasser v. Parker*

Peter Lake

ESSAY

VIRGINIA IS NOT SAFE FOR "LOVERS": THE VIRGINIA SUPREME COURT REJECTS *TARASOFF* IN *NASSER V. PARKER*[*]

Peter Lake[†]

The right of a mental-health-care professional to remain deliberately indifferent to the imminent peril of a woman specifically known to be endangered by a patient who is a mad "lover" with a demonstrated history of extreme violence won a resounding victory recently in the Supreme Court of Virginia in *Nasser v. Parker*.[1] *Nasser* held that a psychotherapist has no duty to warn a woman that his patient, who has threatened to kill her, has left institutionalization even when the woman acts detrimentally upon reliance that the dangerous man is being treated institutionally for his mental disorder.[2] This case represents the first time any court of last resort[3] has

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† Professor of Law, Stetson University College of Law; B.A., (1981), Harvard College, J.D., (1984), Harvard Law School. The author would like to dedicate this essay to T.P. and to others who similarly have given so much that others might learn from their sacrifices.

[1] 455 S.E.2d 502, 506 (Va. 1995).

[2] *See infra* notes 11-26 and accompanying text.

[3] The only other court to date that has rejected *Tarasoff v. Regents of the University of California* is an intermediate court of appeals in Florida. Boynton v. Burglass, 590 So. 2d 446 (Fla. Dist. Ct. App. 1991). *See generally* Andrew C. Greenberg, Note, *Florida Rejects a* Tarasoff *Duty to Protect*, 22 STETSON L. REV. 239 (1992). Florida's Supreme Court has not addressed the issue, but Florida has adopted legislation which permits psychotherapists to warn under appropriate circumstances. *See* FLA. STAT. ANN. § 455.2415 (West 1989 & Supp. 1995). Depending on how one counts, about half of the states have adopted or indicated that they would adopt some type of *Tarasoff* duty to warn, whether judicially or legislatively, or both. *See* Bradley v. Ray 904 S.W.2d 302 (Mo. Ct. App. 1995), *reh'g denied* (Aug. 1, 1995) (engaging in an excellent discussion of the state of

squarely[4] rejected the seminal decision of *Tarasoff v. Regents of the University of California*[5] which held that

> [O]nce a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, [the therapist] bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.[6]

Until now, other jurisdictions had gone in exactly the opposite direction of *Nasser*.[7] The real debate about *Tarasoff* duties had revolved around how to extend or tailor the above holding.[8] Although *Nasser* is an aberration—destined for use in torts casebooks as counterpoint to *Tarasoff* and doomed to condemnation[9]—its reliance upon the *Restatement (Second) of Torts* could bait other courts into following its flawed analysis.

The facts of *Nasser*, as alleged,[10] hardly cry out for no imposition of duty. The murder victim, Angela Nasser Lemon had a "relationship"[11] with George Edwards. When she sought to terminate the relationship, Edwards held a gun to her head

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Tarasoff duties in the United States). If one were revisiting the *Restatement (Second) of Torts*, Topic 7 (affirmative duties), one would now have to recognize a general consensus upon at least the idea that a psychotherapist has a duty to warn a readily identifiable potential victim when a patient communicates a serious threat of physical violence against that person. *Bradley*, 904 S.W.2d at 306-07.

[4] Ironically, the *Nasser* court suggested that that case was distinguishable from *Tarasoff*. *Nasser*, 455 S.E.2d at 504. However, even if *Tarasoff* were not factually distinguishable, *see infra* note 28, the *Nasser* court found the *Tarasoff* decision "unpersuasive." *Id.* at 504.

[5] 551 P.2d 334 (Cal. 1976).

[6] *Tarasoff*, 551 P.2d at 345. *See also* Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 97 (1994).

[7] *See supra* note 3.

[8] *See* Lake, *supra* note 6 at 97-102.

[9] *Nasser* is a survival of tough-sounding, no-affirmative-duty-to-aid cases that have found little support in modern times. *See* Schuster v. Altenberg, 424 N.W.2d 159 (Wis. 1988); Mostert v. CBL & Assoc., 741 P.2d 1090 (Wyo. 1987); Farwell v. Keaton, 240 N.W.2d 217 (Mich. 1976). *Cf.* Yania v. Bigan, 155 A.2d 343 (Pa. 1959). Even the now dated *Restatement (Second) of Torts* analyzed the old no-duty to-rescue cases and anticipated their eventual demise. SEE RESTATEMENT (SECOND) OF TORTS § 314 cmt. (c) and § 314A, Caveat and cmt. (b) (1977). *Nasser* is a modern day *Yania v. Bigan*, and a throwback to a no-duty-to-aid era. *See* Warren Seavey, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960).

[10] Plaintiff's complaint was dismissed on demurrer in *Nasser*. 455 S.E.2d at 502.

[11] *Nasser*, 455 S.E.2d at 502.

and "threatened to kill her."[12] He had done this type of thing before.[13] Lemon sought a warrant for Edwards's arrest,[14] but chose to leave her home and went into hiding to protect herself.[15] Edwards then visited Dr. Charles E. Parker, a licensed psychiatrist, who had treated Edwards for seventeen years for his mental problems.[16] Dr. Parker had full knowledge of the situation: he knew of Edwards's general problem with women, and of the specific recent threat against Lemon.[17] Dr. Parker arrived at a conclusion: "Edwards' mental condition was deteriorating and . . . [he] needed *prolonged* intense therapy in a mental hospital."[18] Edwards was admitted to Peninsula Psychiatric Hospital, albeit and inexplicably "on a voluntary basis,"[19] and into a non-secure section of the hospital.[20]

Lemon learned that Edwards was hospitalized,[21] and, believing that Dr. Parker "had arranged for Edwards to be hospitalized for a prolonged period,"[22] she went home. Edwards left the hospital within approximately twenty-four hours, but revisited Dr. Parker for medication.[23] Just a few days later, Edwards went to Lemon's home, killed her, and then himself.[24] The tragedy might have been avoided with a letter or a simple telephone call from either Dr. Parker or the hospital; that call was never made, nor was Lemon given any notification of Edwards's departure from the hospital.[25]

Minor differences aside, *Nasser's* facts are at least on all fours[26] with those of *Tarasoff*. In *Tarasoff*, a patient told a

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[12] Id. at 502-03.

[13] *Id.* at 503.

[14] *Id.* at 503. Curiously, *Nasser* does not consider any further encounters Edwards may have had with the police and the legal system.

[15] *Id.* at 503.

[16] *Nasser*, 455 S.E.2d at 503.

[17] *Id.*

[18] *Id.* (emphasis added).

[19] *Id.*

[20] *Id.*

[21] *Nasser*, 455 S.E.2d at 503. The Court did not discuss how Lemon learned that Edwards was hospitalized, who told her, or what she reasonably understood Edwards's status in the hospital to be. Because the matter was dismissed on the pleadings, *Nasser* does not give us the benefit of many important facts.

[22] *Id.* at 503.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] The *Nasser* court asserts that *Tarasoff* is "factually distinguishable," but does

psychotherapist at the University of California that he intended to kill his estranged "love" interest.[27] As a result, he was detained by campus police who quickly released him; the psychotherapist's superior ordered that no further attempt be made to detain him.[28] No one was warned.[29] The former patient then went to the victim's apartment and killed her.[30] Change the names, dates, places, and slightly alter the sequence of events, and *Nasser* virtually is *Tarasoff* on its facts: another insane-killer-"lover" case. Since the mid-1970's when *Tarasoff* was decided, American jurisdictions have consistently found at least some duty to warn or protect persons endangered by psychotherapists' dangerous patients,[31] especially in this context.

In lieu of putting the problem in its proper societal perspective, and deftly ignoring the weight of authority and the virtual dearth of support for its holding in other jurisdictions,[32] *Nasser* chose to hide behind a technical—and technically inaccurate and incomplete—analysis of the *Restatement (Second) of Torts*.[33] *Nasser* put great emphasis upon being

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not explain its conclusion. *Nasser*, 455 S.E.2d at 504. One might distinguish the case on the ground that the campus police did briefly detain the future murderer in *Tarasoff*. This action might raise an inference that someone "took charge" of the killer (*Tarasoff* did not raise such an inference). Even so, *Nasser* mistakenly equates taking charge with taking custody (*see infra* note 46), and the killer in *Tarasoff* was not taken into custody when being detained by campus security.

[27] *Tarasoff*, 551 P.2d at 339.

[28] *Id.* at 339-340.

[29] *Id.* at 340.

[30] *Id.* at 339.

[31] *See supra* note 3.

[32] *Nasser* only recognized the weight of authority around the country through the mouth of the plaintiff's lawyer, stating, "The plaintiff says that *Tarasoff* . . . is . . . recognized as the foremost authority on the duty of a mental health professional to warn a known victim of the danger presented to him or her from the professional's patient." *Nasser*, 455 S.E.2d at 504. Plaintiff's lawyer is right. *See* Bradley v. Ray, 505 S.W.2d 302, 306-07 (Mo. Ct. App. 1995).

[33] *Nasser*, 455 S.E.2d at 504. *Nasser* illustrates the jurisprudential pitfalls of semi-authoritative documents like a *Restatement*. Particularly in the area of affirmative duties, the *Restatement (Second) of Torts* is easy to characterize in overly simplistic (and incorrect) ways, and its obtuseness often baits courts to do something that distracts them from common law analytical reasoning. *See* Lake, *supra* note 6. There is also something peculiarly dangerous about adopting one section from a *Restatement* topic while ignoring other sections when the sections were intended to be read together. *See Nasser*, 455 S.E.2d 504 (determining that Sections 316-318 were inapplicable).

faithful to that *Restatement*,[34] but like Edwards, was willing to sacrifice the thing adored for the sake of misguided affection.

The *Nasser* court began its analysis by rejecting *Tarasoff*, stating, "we find the decision unpersuasive [because] it is at odds with the Court's interpretation of the *Restatement*'s provisions relating to one's duty to control the conduct of a third party."[35] The court focused its attention upon *Restatement (Second) of Torts*, section 319 and its link to section 315 of that *Restatement*.[36] Section 315, which the *Restatement (Second) of Torts* considers to be a "special application of the general [limited no-duty] rule stated in section 314," provides as follows:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty which the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.[37]

Nasser involves a section 315 (a) question because it relates to special relationships between a psychotherapist and a patient (the "actor" and "third person"),[38] and for which the *Restatement (Second)* provides a specific list of special relationships in sections 316-319.[39] *Nasser* thus turned to section 319 for guidance.[40]

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[34] *Nasser*, 455 S.E.2d at 506.

[35] *Id.* at 504.

[36] *Id.* at 504-05. The court correctly eliminated *Restatement (Second) of Torts* § 316 (parent/child duties), § 317 (master/servant duties) and § 318 (possessor of land or chattel/licensee duty) from consideration. RESTATEMENT (SECOND) OF TORTS §§ 316-318 (1977).

[37] *Restatement (Second) of Torts*, § 315 cmt. a. Section 314 provides:
The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection *does not of itself* impose upon him a duty to take such action. *Id.* at § 314 (emphasis added). *Restatement (Second) of Torts* § 314 does not state, as is sometimes believed, that there generally is no affirmative duty to aid or protect.

[38] *Nasser*, 455 S.E.2d at 504. However, some courts are not averse to considering that the family of a patient is in a special relationship with the doctor as well. *See, e.g.* Hoffman v. Blackmon, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970) (recognizing a physician's duty to family members of a patient once a contagious disease is known to exist), *appeal denied*, 245 So. 2d 257 (Fla. 1971).

[39] RESTATEMENT (SECOND) OF TORTS, § 315 cmt. (c) (1977).

[40] *Nasser*, 455 S.E.2d at 504. *See supra* note 36 and accompanying text.

Section 319 provides for a certain type of special relationship:

> One who *takes charge of* a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.[41]

The application of section 319 presents some tricky problems.[42] For example, the *Restatement* chose the "takes charge of" formulation in lieu of a "takes control of" or a "taken custody of"[43] formulation. *Nasser* brushed past such distinctions and effectively ruled that in order to take charge of someone within the meaning of section 319, one must actually assert custody *or* control over that person.[44]

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[41] RESTATEMENT (SECOND) OF TORTS § 319 (emphasis added).

[42] *See* Lake, *supra* note 6, at 130-152.

[43] *See* Lake, *supra* note 6, at 130-52.

[44] *Nasser*, 445 S.E.2d at 506. After reviewing two earlier cases, Fox v. Custis, 372 S.E.2d 373 (Va. 1988) (holding there is no duty and no § 315(a) special relationship between a parole officer and a parolee), and Dudley v. Offender Aid and Restoration of Richmond, Inc., 401 S.E.2d 878 (Va. 1991) (holding there is a duty and § 315(a) special relationship between half-way house and prisoner), the court ambiguously concluded:

> Accordingly, we disagree with the holding of *Tarasoff* that a doctor-patient relationship or a hospital-patient relationship alone is sufficient, as a matter of law, to establish a "special relation" under *Restatement* § 315(a). Within the context of the *Restatement* [meaning § 315(a) not § 315(b); otherwise clearly false], there is nothing special about the ordinary doctor-patient relationship or hospital-patient relationship. We think there must be added to those ordinary relationships the factor, required by § 319, of taking charge of the patient, meaning that the doctor or hospital must be vested with a higher degree of control over the patient than exists in an ordinary doctor-patient or hospital-patient relationship before a duty arises concerning the patient's conduct.

Nasser, 455 S.E.2d at 506.

That conclusion would be ambiguous without specifying what the ordinary relationship looks like. However, as if to slam the door, the Virginia Supreme Court apparently clarified this point in response to plaintiff's argument that only a minimal duty was owed:

> The plaintiff argues, however, that while a higher degree of control might be appropriate when an effort is made to impose upon a doctor or hospital a duty to confine the third person, such degree of control is inappropriate "when the sole question is whether there existed a duty to warn a known potential victim of the danger [posed] by the at large patient." In the latter situation, the plaintiff opines, "the necessary amount of control is minimal," and he requests that we apply the minimal degree standard in this case and reverse and vacate the trial court's order sustaining the defendants' demurrers.

There are several problems with *Nasser's Restatement (Second) of Torts* analysis, one inherent in section 319, with the others arising from other sections. Ironically, the *Restatement (Second) of Torts* favors liability for several reasons other than section 319 reasons. First, *Nasser* is problematic under section 319 because it equates "taking charge" with taking "control" and with having "custody." There is some reason to believe that the *Restatement* intends for these different terms to be treated equally,[45] but the rule stated in section 319 is "noticeably broader" than the illustrations which accompany the section.[46] There is plenty of room in section 319 for growth if taking charge of someone is possible even when one does not have control or custody of that individual.[47]

Nasser may very well be that case. In *Nasser*, Dr. Parker may well *have had the power to exert control* over Edwards, or *to have others exert control* over or take custody of him.[48] *Nasser* leaves open many questions—should not Dr. Parker have tried to secure Edwards's presence in the hospital through involuntary commitment or nonrevocable voluntary commitment?[49] Should not Dr. Parker have taken appropriate

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> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1438 (1986), we deny the plaintiff's request. To grant the request would be to render all but meaningless the "takes charge" language of *Restatement* § 319. That language imports much more than a minimal degree of control, conveying, instead, the notion, as pertinent in the health care context and applicable to both a duty to confine and a duty to warn, that to take charge of a patient means, paraphrasing Fox, to "assert custody in the sense that the [patient] is in the personal care and control of the [doctor or hospital]."

Nasser, 455 S.E.2d at 506 (citation omitted).

[45] *See* Lake, *supra* note 6, at 130 and nn. 191, 192, 193.

[46] *See* Lake, *supra* note 6, at 130 and n.191.

[47] *See* Lake, *supra* note 6, at 130 and n.190.

[48] *Nasser's* factual recitation does not disclose whether or not Dr. Parker could have involuntarily committed or otherwise controlled or secured Edwards, or whether or not Dr. Parker might have called the police and caused Edwards to be taken into legal custody. It would not be unusual for an individual charged with assault who had a prior record to return to custody to explain specific threats made against a prior victim. At the very least, in many *Nasser*-like cases there would be the opportunity to exert control. Although neither illustration to § 319 answers the question, it seems that in light of those illustrations, if a patient is admitted to a hospital suffering pains (and at that point is not secured) and it turns out that she has the deadly Ebola virus, a doctor who failed to quarantine that patient (if reasonably able to do so) or take other reasonable action for the protection of others must do so under § 319.

[49] *See* RESTATEMENT (SECOND) OF TORTS §§ 120, 120A (1977) (distinguishing

and reasonable steps to attempt to have the law enforcement system control Edwards's behavior, either by incarcerating him, or by controlling his access to Lemon or her home?[50] Section 319 is consistent with affirmative responses to these questions because taking charge can occur even when one does not have control or custody.

Nasser attempts to sidestep problems with its section 319 reasoning by pointing out, correctly, that *Tarasoff* does not cite section 319,[51] and is a weak section 319 case at best.[52] In *Tarasoff*, it is not clear whether the therapists took charge of the dangerous patient in any significant sense at all: the patient in *Tarasoff* confided his dangerous intentions to a psychologist (not a psychiatrist) in an out-patient setting.[53] Moreover, the therapists in *Tarasoff* may have chosen not to take charge of the patient, even if they were in a position to do so if necessary.[54] That *Tarasoff* is a weak section 319 case does not mean that *Nasser* is weak, or as weak. *Nasser* differs in a proliability way because a licensed physician arguably took charge of Edwards by putting him in a hospital setting, a setting where presumably it was at least possible to secure his presence. Ironically, if *Nasser* is distinguishable from *Tarasoff*, it is distinguishable in that it may actually be the stronger case for the imposition of a duty to warn.

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privilege to detain from privilege to arrest).

[50] One way to control Edwards's behavior would have been to remove his access to certain avenues of behavior. Control does not always imply complete restraint or imprisonment but can involve limiting access to one or another avenue of opportunity. Hence "crowd" control is a meaningful notion even outside of concentration camps or prisons. Dr. Parker had such control. By warning Lemon he would have had an effective way to control his patient's violent behavior. *Nasser* misses the nuances of control and the subtleties of power.

[51] *Tarasoff* is difficult to reconcile with the *Restatement (Second) of Torts* because it sidesteps a consideration of § 319 in its analysis. *See* Lake, *supra* note 6, at 130. That *Tarasoff* is unpersuasive under the *Restatement (Second)* § 319 does not mean that I regard *Tarasoff* as an unpersuasive case, as *Nasser's* characterization of my argument suggests. *Nasser*, 445 S.E.2d at 506. To the contrary, *Tarasoff* is a persuasive development under the *Restatement (Second) of Torts* and in the common law of affirmative duties and duty generally.

[52] Lake, *supra* note 6 at 130; *Nasser*, 445 S.E.2d at 505-06.

[53] *Tarasoff*, 551 P.2d at 339-340.

[54] Lake, *supra* note 6, at 130. For purposes of § 319 liability it would appear that one must actually take charge of a patient—not simply be in a position to do so if necessary. In addition, any decision not to take charge of a patient would factor against § 319 liability.

In addition to the inherent problems under section 319, *Nasser* presents a far greater dilemma, both as a *Restatement (Second) of Torts* case and as a case that is out of step with clear trends in common law tort adjudication. *Nasser* does not even address obvious problems under *Restatement (Second) of Torts* sections 321 and 324A raised by its decision. Both sections (also in Topic 7 of that *Restatement*) have prima facie applicability in *Nasser*, yet the court disregards them entirely for no apparent reason other than the hyper-technical reason that demurrer was granted under section 319.

Section 321 provides:

> (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect. (2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.[65]

That section is so obviously implicated in *Nasser* that its absence from consideration is baffling. If Dr. Parker did not know that his act (or the hospital's acts, or both) of voluntarily committing Edwards created an unreasonable risk of harm to Lemon by providing her falsely with a sense of security, he should have at least considered the possibility. No one need suggest that it was wrong to bring Edwards into care: it was unreasonable to do so in a way that might worsen the position of Lemon by putting her at risk. The recitation of the facts suggests this prima facie argument—and leaves only speculation in rebuttal.

Or, consider section 324A, which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.[66]

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[65] RESTATEMENT (SECOND) OF TORTS § 321 (1977).
[66] RESTATEMENT (SECOND) OF TORTS § 324 (1977).

Nasser once again presents a prima facie problem under either section 324A(a) or section 324A(c). One could argue that Dr. Parker (and/or the hospital) undertook to provide a service to Edwards that should have been recognized as necessary for the protection of Lemon and that under section 324(a), his failure to warn her of Edwards's departure from the hospital unreasonably increased the risk that she would suffer physical harm and/or under 324(c), Lemon suffered physical harm because of her reliance upon Dr. Parker's undertaking to care for Edwards and upon her belief that it was safe to return home because of that undertaking.

Illustration 5 to section 324A (c) is significantly similar to the facts of *Nasser*:

> A Railroad Company employs B as a watchman at its crossing, to give warning to the public of approaching trains. B goes to sleep in his shanty, and fails to warn of the approach of the train. C, an automobile driver who knows of the usual presence of the watchman, approaches the crossing, and receiving no warning, drives onto the track and is struck and injured by the train. B is subject to liability to C.[57]

The watchman who falls asleep at the scene is similar to the doctor who undertakes to treat but fails to warn of his oncoming patient, while the victim relies upon the protection of the doctor's undertaking. One might suggest that the watchman scenario differs from the situation at issue in *Nasser* in that a railroad company has undertaken a duty to the public, and perhaps a psychiatrist does not. However, Illustration 5 shows that whether or not *B* watchman has undertaken to perform a duty owed to (or intended for) third parties, *B* would become liable when *C* driver acts in reliance upon *B*'s undertaking of performance. *B* does not have to know of *C*, or reasonably anticipate *C*, or anticipate or know of *C*'s reliance; the *fact* that *C* relies is enough once the undertaking has begun and *B* knows or reasonably should know that the undertaking is necessary to protect *some C*. Illustration 5 shows that the "as necessary for the protection" aspect of section 324A has some flexibility in it. Certainty of injury to a given *C* or even any *C* is not necessary—unreasonable risk is. Any argument that Dr.

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[57] RESTATEMENT (SECOND) OF TORTS § 324A, illus. 5 (1977).

Parker did not or should not have regarded his services to Edwards "as necessary for the protection of Lemon" faces problems under Illustration 5.

A variety of additional *Restatement (Second) of Torts* arguments might be made,[58] but one is decisive. If the American Law Institute were to revisit the topic of affirmative duties, it would be forced to acknowledge, *at the very least*, that the comment to sections 315(a) and (b) of the *Restatement (Second) of Torts* is no longer accurate because there is a least one new section 315(a) special relationship, that between psychotherapist and patient, *and/or* that the new "section 319A" is to the effect that a psychotherapist has a duty to warn readily identifiable victims of his patient's violent intentions. *Nasser*, conversely, relied upon a *Restatement* of the law dating from the 1960s and ignored what is now the clear majority rule of the states. The *Restatement (Second) of Torts* did not adequately anticipate the rise of *Tarasoff* rules; formalistic adherence to a *"Restatement"* is now a problem and any attempt to reformulate the law under such a heading must recognize that the law is not static and anticipate expansion, contraction, modification and refinement in tort doctrines.[59]

Not only did *Nasser* overlook the majority rule, it completely failed to address the approach to questions of duty, affirmative duty, and tort liability ushered in by *Tarasoff* and its progeny.[60] The result is that *Nasser* leaves open a variety of important questions: Was the *Nasser* court protecting the confidentiality of potential client relationships (an odd case to do so)? Did the *Nasser* court think that a duty was too great a burden on those who provide medical services, or too great a

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[58] For example, one might raise the specter of a § 314A relationship when the victim is a family member of the patient. *See* Hoffman v. Blackmon, 241 F. 2d 752 (Fla. Dist. Ct. App. 1970), Or a clever twist on § 327 might arise: *Nasser's* inaction could be seen as negligently interfering with Lemon's self-rescue. It is a peculiar oversight of § 327 that it does not specifically recognize (although it should) that one may negligently interfere with another's attempt at self-rescue from physical harm.

[59] Most courts recognize the limits of the *Restatement* approaches. *See, e.g.*, McCain v. Florida Power, 593 So. 2d 500, 503 (Fla. 1992) (noting that statutes, books and case law are not required to "catalog and expressly proscribe every conceivable risk in order for it to give rise to a duty of care"). Jurisprudentially, the *Restatement (Second) of Torts* is a fairly static document, and not able to capture the many dynamic aspects of tort law.

[60] *See* Lake, *supra* note 6, at 114 & n.93.

burden on the psychotherapeutic community? Does the *Nasser* court believe, as does the court in *Boynton v. Burglass*,[61] that too little predictive science is available to support a duty for psychotherapists to warn of their patients' violent intentions? Did *Nasser* fault a criminal justice system for failing to protect Lemon? Did the *Nasser* court believe that a doctor, in effect, should not be vicariously liable in tort for intentional murder? Is there a sense in *Nasser* that Lemon assumed a risk by going back home, or even by entering in to such a relationship? Is *Nasser* a *Palsgraf*[62] throwback to anti-jury sentiments and to court imposed rules limiting the scope of duty?

Nasser failed to engage in the type of analysis of questions of duty, affirmative duty, and liability that most American jurisdictions accept as the method to determine such matters.[63] Modern American courts, many following *Tarasoff* specifically,[64] now state several axioms about duty and tort liability:

(1) analysis of liability begins with duty;
(2) duty is not sacrosanct, but a conclusion;
(3) the determination of duty depends upon a consideration of policy or other considerations.[65]

Nasser did not even advert to this body of tort law. As a result, its analysis suffers, and leaves nagging questions as to the real motivation behind a counter-intuitive approach to such a pressing social problem. Underneath the formalistic rhetoric of *Nasser* lie the considerations upon which it rests. Although we do not know what those considerations were because the *Nasser* court did not share them with us, it is clear that *Nasser* valued the right of a psychotherapist to remain deliberately

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[61] 590 So.2d 446 (Fla. Dist. Ct. App. 1991).

[62] Palsgraf v. Long Island R.R. Co., 249 N.Y. 511, 164 N.E. 564 (1928).

[63] *See* Lake, *supra* note 6, at 151 & n.352.

[64] *See* Lake, *supra* note 6, at 114-15 & n.93.

[65] *See* Lake *supra* note 6, at 114 and nn. 91 & 93. This approach mirrors Prosser's preferred approach, and in many instances courts expressly rely upon Prosser. *See* Lake, *supra* note 6, at 114 n.93. The *Restatement (Second) of Torts* did not adopt Prosser's vision of the nature and source of duty as such, but American courts have typically looked to Prosser for guidance on basic questions of the nature and source of duty instead of the *Restatement (Second) of Torts*. It is time for the American Law Institute to revisit the question of duty generally, and to recognize that the formalistic and static jurisprudence that it promotes has not been favored by American courts with respect to questions of duty.

indifferent over the safety of a third party.

While *Nasser's* more general implications are open to debate, its immediate practical consequences are obvious. Although the court encouraged further litigation over how to distinguish the case by suggesting that it is distinguishable from *Tarasoff*, albeit without elaboration, there can be little doubt that *Nasser* virtually immunizes psychotherapists from tort responsibility to specific individuals and to the public when such psychotherapists fail to use their professional judgment and to warn of imminent danger. That should not be the rule in Virginia and the Virginia legislature should consider overruling *Nasser* by legislation. Such legislation could take a variety of forms; there are several *Tarasoff*-like statutory variations that have been adopted around the United States.[66] At a minimum, such legislation should impose a duty to warn upon a psychotherapist who knows or should know under applicable professional standards that a readily identifiable third person is in danger after a patient communicates "a serious threat of physical violence"[67] against that third party. Such legislation should, of course, protect anyone giving such warnings from tort or other liability for disclosing such information.

Nasser represents a step in the wrong direction socially, doctrinally and jurisprudentially. We can hardly live in our modern, crowded and violent society when professionals deliberately disregard the opportunity to save a life from a violent end, and do so when there is no risk or cost to themselves. When a court turns to formalistic reliance upon the *Restatement (Second) of Torts*, it should consider the document carefully and as a whole, and not pick and choose convenient rationales while ignoring obviously countervailing rationales that are contained within topics of that *Restatement* meant to be read as a whole. Finally, *Nasser's* jurisprudence hearkens to another era when courts were reluctant to offer little more than rules as their analysis. If a court finds that a woman's right to physical security in her home, once cherished by the common law, must yield to the right of a medical professional to be consciously indifferent to her imminent danger even

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[66] *See, e.g.*, Bradley v. Ray, 904 S.W.2d 302, 309 (Mo. Ct. App. 1995) (citing various states' statutory provisions).

[67] *Bradley*, 904 S.W.2d at 307.

when that professional's actions may have contributed significantly to the risk of her harm, that court should provide more than a partial, flawed and formalistic *Restatement (Second) of Torts* justification.